Supreme Court, U.S.
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No. 00-414

IN THE

Supreme Court of the United States

ROBERT WILSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Is the fundamental right to testify, waivable only by the accused and not counsel, adequately safeguarded by the dual requirement (i) that all claimed violations be assessed by the test that measures counsel's effectiveness and (ii) that to avoid summary dismissal of such a claim, *the defendant* procure corroboration from the attorney he must claim was ineffective?

When it is established that counsel deprived the accused of his right to testify, what if any additional showing warrants a new trial?

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Appendix B — Memorandum And Order Of The United States District Court For The Southern District Of New York Dated March 5, 1999 .... 11a

Petitioner Robert Wilson respectfully requests that a writ of certiorari be issued to review the judgment of the Second Circuit Court of Appeals in this case.

OPINIONS BELOW

The Second Circuit summary order dated June 15, 2000 (App. A) is unpublished, referenced in the table at *United States v. Wilson*, 216 F.3d 1074 (2d Cir. 2000), and appears in full text at 2000 WL 778021. The district court opinion (App. B) is unpublished but is found at 1999 WL 126456 (S.D.N.Y. Mar. 9, 1999).

STATEMENT OF JURISDICTION

The date on which the United Stated Court of Appeals for the Second Circuit issued its decision was June 15, 2000. This Court has Jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution states in pertinent part: "No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . ."

The Sixth Amendment to the United States Constitution states in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor. . . ."

The Fourteenth Amendment to the United States Constitution states in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

A. The Conviction

Petitioner Robert Wilson, seventy-five years of age, is the former African-American president of Local 174, affiliated with the United States Food and Commercial Workers International Union, AFL-CIO, which represents meat industry employees in and around New York City. Before becoming union president in 1983, Wilson served the union for more than a decade as a business agent and then vice president.

In July 1995, Wilson and four other officials of Local 174 were accused of accepting payoffs from employers who sought to evade union rules. The United States District Court for the Southern District of New York had jurisdiction over the proceeding commenced by an indictment charging Wilson and four others with violating federal law, including the Taft-Hartley Act, 29 U.S.C. § 186(b)(1), and the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1962(c) and (d). Wilson stood trial alone and the jury convicted on all three counts, but specifically found Wilson not guilty of two of the listed acts of racketeering.[1] Downwardly departing, the district court sentenced Wilson to a year of home confinement, two additional years' probation, a fine of $15,000, and 100 hours of community service. The district court noted Wilson's

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1. Count One charged a RICO conspiracy; Count Two, the substantive RICO charge, listed four groups of racketeering acts reflecting payoffs involving four different employers; and Count Three realleged one set of the racketeering acts as a separate Taft-Hartley charge.

impressive record of charitable works, and his ailing wife's dependence on him for her basic daily needs.

B. Wilson's Desire to Testify

Wilson submitted a seven-page sworn affidavit, post-trial, in which he told the district court that he had wanted to testify in his own defense but that trial counsel, not Wilson, made the final decision. In a narrative of Wilson's frustration with counsel during the final days and hours of his trial, the affidavit interweaves counsel's censoring of Wilson in the larger context of counsel's general failure to heed much of what Wilson had to say, culminating in the failure to consult Wilson at all.

Excerpts pertinent to the right to testify include the following: (i) "I was prepared . . . to testify myself and told Mr. Cohn that I wanted to testify in my defense"; (ii) "At one point, there was a brief effort to prepare for my testimony in the event that I would testify"; (iii) "there was [no] discussion between myself and Mr. Cohn as to whether my appearance as a witness would be decided, at the close of the government's case, depending on the strength or weakness of the evidence presented against me"; (iv) "In effect, given [the] lack of preparation, the decision that I would not testify was a foregone conclusion because of Mr. Cohn's personally held belief that it would be a mistake for me to expose myself to cross-examination"; (v) "Mr. Cohn was reluctant for me to testify because I might be cross-examined concerning an extra-marital relationship . . . [but] I was prepared to deal with that"; and (vi) "Mr. Cohn was also concerned about other areas of cross-examination, but I assured him that no one could truthfully accuse me of wrongdoing."

Counsel, not Wilson, made the final decision that Wilson not testify: counsel played an excerpt from a government tape, "and then," Wilson attests, "to my shock, rested my case . . . [counsel] was some distance from me when that happened, across the courtroom. He had never told me that he was going to rest the defense at that point, without first discussing it with me, and possibly calling me to the witness stand."

Wilson described what he hoped to accomplish by testifying. He wanted to "defend[] [him]self against the specific false allegations of some of the witnesses" and "was prepared to lay bare the falseness of the government's insidious innuendo that [he] was involved with members of the so-called 'mob.' " The affidavit addresses other exculpatory information that Wilson knew himself or that could be elicited from other witnesses. Wilson furnished the witnesses' names to counsel but counsel did not contact any of them.

Wilson's desire to testify, and the probable contents of his testimony, are best appreciated in the context of the Government's case. Wilson was charged with involvement in four different sets of payoffs involving four different employers dating as far back as 1975. By the Government's concession, the timeliness of the entire prosecution depended on the latest three of the fifteen alleged instances of payoffs, which involved the employer Associated Supermarkets. The Government's sole evidence on these three acts came from Associated owner Morton Sloan, who attributed to Wilson a remark that the Government claimed set in motion ten years of quarterly payments of $2,250 that Sloan made to other

officials, not Wilson.[2] Wilson did not receive any of the money, Felice pleaded guilty to accepting the money but did not implicate Wilson, and Wilson's name did not come up in the Sloan-Felice conversation. Sloan also admitted that he was not thinking about the idea of payoffs when he decided to approach Wilson, whom he selected in part because it was unclear to him who was the normal Associated union representative; that Wilson's remark meant nothing to him; that Sloan was not certain of Wilson's exact words; and that it was Sloan, not Felice, who brought up the idea of payments.

Wilson had an account of the meeting with Sloan but the jury never heard it.

The remaining racketeering acts, time-barred on their own, were only prosecutable if part of an overarching conspiracy that included the Associated payments. The different sets of payoffs lacked common signature features, such as payee, method of payment and amount, but the Government sought to connect the dots through hearsay testimony, to which Wilson's counsel failed to object, that allegedly assigned to Wilson a share of moneys no live witness testified he ever received, or good relations with individuals who Wilson told his lawyer (and would have testified himself) were his enemies.

Wilson was prepared to offer factual reasons for not believing this second- and third-hand testimony, which because it was hearsay was not subject to cross-examination, but the jury never heard them.

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2. Sloan testified that when he came to see Wilson, as president, with a complaint, Wilson referred him to Felice with the suggestion that they "take a walk around the block" to discuss Sloan's "problem."

Without first conducting a required preliminary hearing,[3] the trial court admitted a pair of plea allocutions of two non-testifying codefendants that contained non-self-inculpatory portions implicating (i) an individual named William Kissel, who lay at a pivotal juncture in the connection the Government tried to forge between Wilson and the many payoffs no witness testified he ever received, and (ii) unnamed "others" whom a jury might think included Wilson. Wilson hoped to rebut these false inferences as well.

At the close of the Government's case Wilson moved for a judgment of acquittal. The district court denied the motion despite noting, "I don't think anybody disputes this [is] a fairly close case on this motion."

C. The Post-trial Motion

Besides raising the right to testify claim, Wilson's post-trial motion challenged the sufficiency of the evidence, and asserted that counsel rendered constitutionally ineffective assistance in that, inter alia, he failed to contact any of the witnesses on a four-page list furnished by Wilson;[4] inadequately consulted Wilson as the trial progressed; failed to object to hearsay testimony through which the Government sought to link the different payoff schemes; failed to cite to the district court the controlling authority governing admission of co-conspirator plea allocutions or to request

3. *See United States v. Williamson*, 512 U.S. 594 (1994).

4. Wilson personally prepared the list, captioned "Witnesses and Information They Have," with several subcategories grouping the witnesses by type of information, which Wilson believed could undermine essential features of the Government's umbrella conspiracy theory.

the court to conduct the required preliminary inquiry before admitting them; moved to strike exculpatory testimony; and in his opening remarks essentially inculpated Wilson[5] and elevated his alleged role in the charged conspiracy.[6]

D. The Decisions Below

The district court, over a year after briefing was complete, rejected all grounds in the post-trial motion. On the right to testify claim, the court concluded:

> It is plain from defendant's moving affidavit that the question [of testifying] was discussed with him. Indeed, defendant acknowledges awareness of trial counsel's "personally held belief that it would be a mistake for [him] to expose [him]self to cross-examination." Defendant does not say that trial counsel did not inform him that the "ultimate decision whether to take the stand" belonged to the defendant[7] . . . or that he had told trial counsel that he had chosen to testify notwithstanding trial counsel's view that it would be a mistake. Defendant's affidavit is, in fact,

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5. Counsel's opening, misusing the concept of "betrayal," characterized the Government's cooperating co-conspirator witnesses as Wilson's former confederates in crime about to betray him.

6. Rather than argue that Wilson was mistakenly assumed to be guilty by association, counsel told the jury that Wilson was the target of the investigation.

7. The district court quoted *Brown v. Artuz*, 124 F.3d 73, 79 (2d Cir. 1997), *cert. denied*, 522 U.S. 1128 (1998), a decision discussed throughout this petition.

> most consistent with a determination by defendant and trial counsel, after discussion, that it would be up to trial counsel to call defendant or not as he thought it advisable . . . The decision not to call defendant, further, was not unreasonable in the circumstances, in view of possible cross-examination.

(App. B).

The Second Circuit, affirming, faulted Wilson for "offer[ing] nothing beyond his own self-serving affidavit," and specifically for "having presented [no] affirmation from his trial counsel." The Second Circuit concluded that, "[a]s the district court noted, it is far from clear that Wilson's affidavit, read in its totality, even alleged that his trial counsel failed adequately to consult and inform him about his right to testify." The Second Circuit went on to rule that "[e]ven assuming arguendo that appellant was not so advised, he has made no showing that his failure to testify somehow prejudiced his defense," citing *Brown v. Artuz* and the prejudice prong of the test for ineffective assistance of counsel claims announced in *Strickland v. Washington*, 466 U.S. 668 (1994). (App. A).

REASONS FOR GRANTING THE WRIT

Summary

The petition should be granted because the Second Circuit decision, in disregard of this Court's pronouncements on the fundamental nature of the constitutional right to testify, *see Rock v. Arkansas*, 483 U.S. 44 (1987), imposes an insurmountable burden that, if undisturbed, will deprive defendants of meaningful post-conviction redress when that right is denied. Despite being sufficiently alerted to a deprivation of the right to testify, the Second Circuit rewrites a generation of constitutional law by allowing an accused's fundamental right to be waived unknowingly or involuntarily.

The Second Circuit decision in this case augments the analytical flaws in the inherited legal framework on which it rests. Assembled in a patchwork fashion by the circuits and states, the framework is a body of conflicting answers to questions unresolved by *Rock v. Arkansas* that, having been extensively addressed by every circuit in the intervening thirteen years, are now due for resolution by this Court. The Second Circuit's decision conflicts with the majority of decisions that recognize the constitutional duty of judicial inquiry under the circumstances present here.

Not long before this case, the Second Circuit held, contrary to many other courts and on territory unexplored by this Court, that defense counsel, not the judiciary, bears the primary responsibility for safeguarding the defendant's right to testify. *Brown v. Artuz*, 124 F.3d 73, 79 (2d Cir. 1997), *cert. denied*, 522 U.S. 1128 (1998). As a consequence, the *Brown* court went on to hold that claimed violations of an accused's right to testify must be framed as

claims that trial counsel rendered constitutionally ineffective assistance, requiring the accused to satisfy the formidable two-part error and prejudice test of *Strickland v. Washington*, 466 U.S. 668 (1984). *Brown*, 124 F.3d at 79. The two rights, however, exist to protect opposing interests. The right to testify advances individual autonomy even to the detriment of sound strategy or the best outcome, whereas effective counsel chiefly promotes fair process and reliable results and tolerates a wide range of conduct in the name of sound strategy. If not the wolf guarding the sheep, the *Strickland* standard is doctrinally — and as illustrated by the Second Circuit decision in this case, practically — inadequate to safeguard the right to testify.

Even assuming arguendo the correctness of the *Brown* framework, the Second Circuit's ruling in this case cannot stand. Going beyond *Brown* or *Strickland* and defying logic, the Second Circuit now holds that, *to avoid summary dismissal without a hearing* of a right to testify claim, the defendant must procure a corroborating affidavit from the very attorney whose conduct he must show to be ineffective.

This harsh new principle decides a case in which: (i) the defendant submitted a particularized narrative showing that counsel thwarted his desire to testify; (ii) the panel concedes it is "far from clear" whether counsel adequately informed the defendant of his rights;[8] and (iii) the trial record lacks any discussion of the subject. To be put on notice that a serious violation may have occurred, to concede ambiguity

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8. The constitutional "right to testify" embraces both the obligation not to override the defendant's ultimate choice whether to testify, and the duty to inform the defendant that he has that right. *Brown*, 124 F.3d at 79.

in the record, and to refuse to inquire further is to turn a blind eye, an abdication of the basic judicial obligation to ensure that defendants do not unintentionally or involuntarily waive their fundamental rights.

Compounding these flaws, the Second Circuit also ruled that even if counsel did override Wilson's wish to testify (or did fail to tell Wilson that the decision to testify was his, not counsel's, to make), the conviction must stand nevertheless because Wilson did not show *Strickland* "prejudice." This portion of the ruling cannot be squared with the nature of the interests advanced by the right to testify, which will almost never survive outcome-determinative testing. Nor can the ruling be reconciled with this Court's view that "the most important witness for the defense in many criminal cases is the defendant himself," *Rock*, 483 U.S. at 52, especially in a case like this one, where the defendant's testimony was his only real defense.

Under existing law, the right to testify lives a precarious existence. The fundamental nature of the right compels this Court to bestow both a viable means of redress and sorely needed uniformity.

I.

THE SECOND CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT, ALMOST ALL CIRCUITS, AND MOST STATES

The Second Circuit decision answers the questions presented in this petition differently than the overwhelming majority of state and federal courts, and in a manner too harsh and underprotective of the right to testify to be reconciled with this Court's pronouncements on the right's fundamental nature. To best appreciate the scope, nature, and impact of the Second Circuit's departure from acceptable constitutional doctrine, it is necessary to situate the decision within the unsettled body of right to testify jurisprudence developed since this Court's decision in *Rock v. Arkansas*, 483 U.S. 44 (1987).

A. The Fundamental Nature of An Accused's Right to Testify

In *Rock*, this Court recognized that an accused's right to testify in his own defense is "fundamental," 483 U.S. at 52, and "has sources in several provisions of the Constitution." *Id.* First, the "right to be heard and to offer testimony" is one of the "necessary ingredients of the Fourteenth Amendment's guarantee that no one shall be deprived of liberty without due process of law," 483 U.S. at 51, and is " 'essential to due process of law in a fair adversary process,' " (*quoting Faretta v. California*, 422 U.S. 806, 819 n. 15 (1975)). *Rock*, 483 U.S. at 51. The "right to testify is also found in the Compulsory Process Clause of the Sixth Amendment," which protects a defendant's right to call " 'witnesses in his favor.' " *Rock*, 483 U.S. at 52 (*quoting*

Amend. VI). The "opportunity to testify is also a necessary corollary to the Fifth Amendment's guarantee against compelled testimony," *id.*, the " 'choice of whether to testify' " being " 'an exercise of the constitutional privilege.' " *Id.* at 53 (*quoting Harris v. New York*, 401 U.S. 222, 230 (1971)).

This Court further recognized that "an accused's right to present his own version of events in his own words" is "***[e]ven more fundamental*** . . . than the right of self-representation" recognized in *Faretta*. *Rock*, 483 U.S. at 52 (emphasis added).

Rock, however, left important questions unanswered, including whether the right to testify is personal or tactical; when, and the degree to which, judicial inquiry is required to assess the purported waiver of the right; and the standards by which the purported waiver are measured.

B. The Circuits Unanimously Group the Right to Testify with the Accused's "Personal Rights"

On the first question, in the spirit of *Rock*, every circuit (the Second included) has recognized that the decision whether to testify belongs in the category of rights that are "personal to the defendant" and thus waivable only by the defendant, not counsel, regardless of tactical considerations, as opposed to the group of rights considered matters of trial strategy and tactics, and thus waivable by counsel. *See United States v. Webber*, 208 F.3d 545, 550-51 (6th Cir. 2000), *petition for cert. filed* (June 29, 2000; no. 00-5039); *Frey v. Schuetzle*, 151 F.3d 893, 898 (8th Cir. 1998); *Brown*, 124 F.3d at 77 (Second Circuit so holds, and collecting cases from Third, Fourth, Fifth, Seventh, Ninth, Eleventh and

District of Columbia Circuits). The First Circuit has assumed but not expressly decided this principle, *Lema v. United States*, 987 F.2d 48, 52 (1st Cir. 1993) and *Passos-Paternina v. United States*, 201 F.3d 428, 1999 W.L. 668522 (1st Cir. 1999), *aff'g*, 12 F. Supp. 2d 231, 237 (D.P.R. 1998), and the Tenth Circuit, while in accord, addressed the question before *Rock* but not since. *United States v. Janoe*, 720 F.2d 1156, 1161 (10th Cir. 1983), *cert. denied*, 465 U.S. 1036 (1984).

This Court has not decided the question, but pre-*Rock* dictum has placed the right to testify in the category of "personal" rights. *Jones v. Barnes*, 463 U.S. 745, 751 (1983) ("it is also recognized that the accused has the ultimate authority to make certain fundamental decisions regarding the case, such as whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal."); *Wainwright v. Sykes*, 433 U.S. 72, 93 n.1 (1977) (Burger, C. J., *concurring*) ("Only such basic decisions as whether to plead guilty, waive a jury, or testify in one's own behalf are ultimately for the accused to make.")

C. In Conflict with the Fundamental, Personal Nature of the Right to Testify, The Second Circuit Virtually Eliminates Post-Conviction Redress

Each component of the Second Circuit decision is irreconcilable with the foregoing principles, and in combination, announce an insurmountable pleading and proof burden. First, the Second Circuit, faulting Wilson's failure to furnish a corroborating statement from the lawyer he must claim was ineffective, puts a defendant seeking redress for a denial of his right to testify in an untenable position. The relevant question is not whether it is sensible to require that the attorney be heard from — the claim could

rarely be resolved without trial counsel's version of relevant conversations — but whether the defendant should be made to suffer summary dismissal if *he* does not succeed in obtaining the cooperation of his counsel-made-adversary. By noting the absence of a statement from the attorney in Wilson's motion papers, the Second Circuit articulated the very reason a hearing should have been ordered. (Nor does the Second Circuit appear to have considered that *sua sponte* confessions of ineffectiveness might smack more of collaboration than corroboration).

The Second Circuit's implied ruling that Wilson's affidavit fails, on its own, to sufficiently alert the Court to the need for further inquiry raises the pleading burden on right to testify claims to an impossibly elusive standard. When counsel overrides an accused's desire to testify, the deed rarely occurs in a discrete nugget of conversation but rather through a series of acts, statements and omissions that a defendant might not necessarily distill to perfection in a post-conviction retelling. The sound judicial impulse to discourage frivolous claims cannot become, as it has in the Second Circuit, a blind-eye to very real distress signals. If not the ideal narrative, Wilson's affidavit unambiguously triggers a court's duty to inquire; as excerpted *supra* at pp. 2-4, the affidavit shows that: (i) Wilson wanted to testify; (ii) his counsel unequivocally knew that this was Wilson's desire (both because Wilson told him so and because counsel began to prepare Wilson); and (iii) counsel, not Wilson, made the final decision that Wilson would not be testifying.[9]

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9. Knowing that Wilson wanted to testify, counsel rested the defense without consulting him. The Eleventh Circuit has recognized how the opportunity to testify can literally slip away from the accused against his will in just this way:

(Cont'd)

In response, the Second Circuit strictly construed each of Wilson's words and omissions against him, even though the Government neither challenged the credibility of Wilson's affidavit in the district court nor, despite ample opportunity, obtained information from counsel. The record lacks any other basis for summarily discrediting Wilson.[10]

(Cont'd)

> The defendant may not realize until after the jury has retired to deliberate that the proper time for his testimony has passed. Furthermore, once a defendant elects to take advantage of his right to counsel, he is told that all further communications with the court and the prosecutor should be made through his attorney. Aside from any testimony he may give at pre-trial hearings or during trial, a defendant is not permitted to speak directly to the court. In fact, in the interests of decorum, and the smooth administration of justice, defendants who speak out of turn at their own trials are quickly reprimanded, and sometimes banned from the courtroom, by the court. It would be anomalous to consider the right to counsel of fundamental importance because of the common lack of understanding of the trial process by defendants, and to require a defendant to rely on his attorney to be his sole spokesperson in the courtroom, while at the same time holding that by failing to speak out at the proper time a defendant has made a knowing, voluntary and intelligent waiver of a personal right of fundamental importance such as the right to testify.

United States v. Teague, 908 F.2d 752, 759-60 (11th Cir. 1990), *reh'g granted*, 953 F.2d 1525 (11th Cir.), *cert. denied*, 506 U.S. 842 (1992).

10. *Cf., e.g., United States v. Ortiz*, 82 F.3d 1066, 1072 (D.C. Cir. 1996) (post-conviction claim not credible because court had discussed issue of defendant's testifying with counsel during

(Cont'd)

The other requirements imposed by the Second Circuit are equally unprecedented or unrealistic. The implied requirement of talismanic pleading[11] promotes form over substance and invites abuse. More meaningful than a token phrase or conclusory assertion, Wilson's affidavit furnished the imperative index of credibility — context. The context demonstrates the affiant's frustration and powerlessness, the opposite of knowledge that he had a constitutional right to override counsel's view on the question of testifying. It is entirely consistent with this reading that the affidavit lacks an assertion that "my attorney did not tell me I had a constitutional right to disagree with him," which reasonably reflects the fact that Wilson did not know how much he did not know because of counsel's inadequate advice. At the very least, the susceptibility of the affidavit to reasonable interpretation in Wilson's favor was sufficient for the courts below to have inquired further, given the fundamental nature of the right to testify and the relatively small investment of

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(Cont'd)

trial); *Siciliano v. Vose*, 834 F.2d 29, 30-31 (1st Cir. 1987) (post-conviction claim not credible because record showed defendant had heard trial judge say he had right to testify but said nothing); *United States v. Robles*, 814 F. Supp. 1233, 1243-44 (E.D. Pa. 1993) (post-conviction claims contradicted by colloquies court had conducted with defendants at trial).

11. As set forth *supra* at p. 6-7, the district court noted that Wilson did not "say that trial counsel did not inform him that the 'ultimate decision whether to take the stand' belonged to the defendant," *quoting Brown*, 124 F.3d at 79 (App. B). The Second Circuit agreed: "as the district court noted, it is far from clear that Wilson's affidavit . . . even alleged that his trial counsel failed adequately to consult and inform him about his right to testify." (App. A).

judicial time required.[12] The Second Circuit, however, announces a standard that doubtful waivers will be tolerated, an abdication of the "judiciary's obligation to provide the accused with an adequate mechanism to fairly address" his constitutional claims. *United States v. Martinez*, 181 F.3d 627, 628-29 (5th Cir. 1999).

D. Graver Conflicts — the Questions of Waiver and Judicial Inquiry

Returning to the issues unaddressed by *Rock*, courts have framed the questions of waiver and the duty of judicial inquiry in terms of who — the trial court, defense counsel, or the defendant himself — bears primary responsibility for safeguarding the right to testify.

The Second Circuit decision conflicts sharply with the group of decisions, from courts of various states, that place the responsibility in the first instance with trial courts and thus require or strongly urge that inquiry into waiver be conducted as a matter of course by the trial judge. *LaVigne v. State*, 812 P.2d 217, 222 (Alaska 1991); *People v. Curtis*, 681 P.2d 504, 514-515 (Colo. 1984) (en banc); *Tachibana v. State*, 900 P.2d 1293 (Haw. 1995); *Culberson v. State*, 412 So. 2d 1184, 1186-7 (Miss. 1982) (en banc); *State v. Davis*, 422 S.E.2d 133 (S.C. 1992); *State v. Neuman*, 371 S.E.2d 77, 71-82 (W. Va. 1988); *Boyd v. United States*, 586 A.2d 670, 675-79 (D.C. 1991) (dictum). One court has suggested that counsel simply obtain a signed waiver from the defendant. *Jordan v. Hargett*, 34 F.3d 310, 314 (5th Cir. 1994), *vacated on other grounds*, 53 F.3d 94 (1995).

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12. The necessary "hearing" would likely involve only a handful of questions to counsel and the accused.

The second school of thought, to which a majority of the circuits and courts of the states subscribe, is that the duty of safeguarding the right to testify rests with trial counsel, not the trial court, which is absolved of any *sua sponte* duty to conduct a colloquy with the defendant. *See United States v. Ortiz*, 82 F.3d 1066, 1069, n.8 (D.C. Cir. 1996) (collecting cases from First, Third, Fourth, Fifth, Seventh, Eighth, Tenth, and Eleventh Circuits); *Waiver: Right to Testify*, 72 ALR 5th 403, 447-457 (1999) (collecting state cases). The Second Circuit's decision in *Brown v Artuz,* on which the decision in this case rests, is also in this general category of cases. Having assigned the safeguarding duty to counsel, these cases take the additional step of using a *Strickland* analysis as the framework for the post-conviction assessment of an accused's waiver.

The third view is that of the Ninth Circuit, which consistently places the duty of safeguarding the right to testify solely on the defendant, and holds that the defendant's silence at trial waives the right and bars virtually any post-conviction challenge. *United States v. Martinez,* 883 F.2d 750, 759-60 (9th Cir. 1989), *vacated on other grounds*, 928 F.2d 1470 (9th Cir.), *cert. denied*, 501 U.S. 1249 (1991); *United States v. Edwards*, 897 F.2d 445, 446-7 (9th Cir.), *cert. denied*, 498 U.S. 1000 (1990).

Those in the "second" or middle group (i.e., those, including the Second Circuit, which employ a *Strickland*-type analysis) are further divisible into separate groups according to two features pertinent to the Second Circuit's decision here. First, unlike the Second Circuit decision, many of the courts in this group recognize that while the court need not *sua sponte* inquire into waiver of the right to testify, there *is* a constitutional duty to inquire when there is

"evidence of something to alert the district court to a problem." *United States v. Ortiz*, 82 F.3d 1066, 1071 (D.C. Cir. 1996). *Accord, United States v. Pennycooke*, 65 F.3d 9, 12-13 (3rd Cir. 1995); *United States v. Thompson*, 944 F.2d 1331, 1345 (7th Cir. 1991), *cert. denied*, 502 U.S. 1097 (1992); *Ortega v. O'Leary*, 843 F.2d 258, 261 n.1 (7th Cir.), *cert. denied*, 488 U.S. 841 (1988); *United States v. Systems Architects, Inc.* 757 F.2d 373 (1st Cir.), *cert. denied*, 474 U.S. 847 (1985) (pre-*Rock* decision followed in *Passos-Paternina*, 12 F. Supp. 2d at 239, *aff'd*, 201 F.3d 428, 1999 W.L. 668522 (1st Cir. 1999)); *Jordan v. Hargett*, 34 F.3d at 314-15. Courts in the states of Arizona, Florida, Georgia, Idaho, Massachusetts, Minnesota, Nevada, Wisconsin and Wyoming have ruled similarly. *See* 72 ALR 5th 403, 441 (1999) (collecting cases).

Although the "sufficiently alert" rule of these cases was announced in the context of trial inquiry, the principle in the rule fairly applies to post-trial inquiry and would warrant further inquiry in the circumstances of this case. By contrast, the Second Circuit's disinclination to endorse these cases, *see Brown,* 124 F.3d at 79 n.2, has manifested itself in the Court's purposeful avoidance of the distress signal sent by Wilson. As discussed above, Wilson's affidavit sufficiently alerted the courts below to a probable suppression of the right to testify, but the Second Circuit turned a blind eye.

E. The Second Circuit Alone Sidesteps the "Knowing, Voluntary and Intelligent" Waiver Standard

Although this Court has not decided the question, there are strong indications in its precedents that waivers of the right to testify, to be valid, should be knowing, voluntary and intelligent within the meaning of *Johnson v. Zerbst*, 304

U.S. 458 (1938). Waivers of other rights in the "personal rights" category must meet this test. *See, e.g., Boykin v. Alabama*, 395 U.S. 238, 242 (1969) (decision to waive trial and plead guilty); *Carnley v. Cochran*, 369 U.S. 506, 516 (1962) (waiver of assistance of counsel); *Adams v. United States ex rel. McCann*, 317 U.S. 269, 277-78 (1942) (decision to forego jury trial). As discussed above, all the circuits have placed the right to testify in the "personal" rights category, which ought to entitle its waiver to *Johnson v. Zerbst* protection as well.

Furthermore, this Court has decided both that the right of self-representation warrants the knowing and voluntary waiver standard, *see Faretta*, 422 U.S. at 835, and that the right to testify is "[e]ven more fundamental" than the right to self-representation. *Rock*, 483 U.S. at 52. It should follow that waivers of the right to testify must pass the *Johnson v. Zerbst* standard.

Finally, nearly all of the cases discussed above employ the *Johnson v. Zerbst* standard. Those in the first group, the state cases requiring trial court colloquy, expressly rely on *Johnson v. Zerbst*, and reason that a colloquy and record evidence of the waiver are the only way to satisfy the constitutional waiver test. Of those in the second group (*i.e.*, the circuits employing *Strickland)*, nearly all incorporate the *Johnson v. Zerbst* standard into their *Strickland* analyses.[13] The only two that do not are the Second Circuit and the Fourth Circuit.

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13. *See Lema v. United States*, 987 F.2d 48, 52-53 (1st Cir. 1993); *United States v. Leggett*, 162 F.3d 237, 245-46 (3rd Cir. 1998), *cert. denied*, __ U.S. __, 120 S. Ct. 167 (1999); *Jordan v. Hargett*, 34 F.3d at 312; *United States v. Webber*, 208 F.3d at 550; *Ortega v. O'Leary*, 843 F.2d at 261; *Frey v. Schuetzle*, 151 F.3d at 898; *United States v. Teague*, 953 F.2d at 1527; *United States v. Ortiz*, 82 F.3d at 1071.

In *Brown*, the Second Circuit made a token reference to *Johnson v. Zerbst* by noting that it was the rationale of the state cases adopting a trial colloquy rule, but the court then rejected those cases and never returned to the vocabulary or the concept of knowing and voluntary waiver in its defense of the *Strickland* framework. *See* 124 F.3d at 78-9. As discussed above, the Second Circuit's summary dismissal rule in this case ratifies the very opposite of a knowing and voluntary waiver. On notice that Wilson's waiver was most likely the result of coercion or ignorance, the court interpreted Wilson's affidavit as if it were a contract of commerce, construing every word and omission strictly against him; indulged every presumption in favor of his attorney; and imposed the insurmountable requirement that *he* obtain the assistance of the attorney who failed him at trial.

Assuming arguendo that use of *Strickland* has a sound constitutional basis (a proposition challenged in the following section), this Court should grant the petition to resolve the conflicts outlined above, which are necessarily implicated by the Second Circuit's decision in this case. Assuming arguendo that every point of conflict discussed above were resolved in favor of the position taken by the Second Circuit, the decision in this case still requires review by this Court because the Second Circuit went further than *Strickland* or *Brown* and announced a standard for right to testify hearings that will virtually never be satisfied.

II.

THE *STRICKLAND* TEST IS A THEORETICAL, DOCTRINAL AND PRACTICAL MISMATCH FOR THE RIGHT TO TESTIFY

The Second Circuit's mistreatment of the right to testify in this case is most fundamentally the result of its decision to employ the *Strickland* test as the exclusive frame through which to examine right to testify claims. Despite that it is the sin of the mathematical majority of courts, the selection of the *Strickland* test has no constitutional basis and actually advances interests wholly at odds with those promoted by the right to testify. In principle and as applied by the Second Circuit, *Strickland* is an inadequate means of safeguarding an accused's right to testify.

This Court has emphasized that the Sixth Amendment right to effective assistance of counsel exists "in order to protect the fundamental right to a fair trial." *Strickland*, 466 U.S. at 684. Thus, "the right to the effective assistance of counsel is recognized *not for its own sake*, but because of the *effect it has on the ability of the accused to receive a fair trial*. Absent some effect of challenged conduct on the *reliability of trial process*, the Sixth Amendment guarantee is generally not implicated." *United States v. Cronic*, 466 U.S. 648, 658 (1984) (emphasis added). The *Strickland* test "reflects this concern." *Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993).

In stark contrast, the right to testify *is* recognized largely for "for its own sake" and advances interests other than the reliability of the proceeding or its outcome. "If a defendant insists on testifying, *no matter how unwise such a decision*,

the attorney must comply with the request." *Ortega*, 843 F.2d at 261 (emphasis added). *See also Teague*, 908 F.2d at 759 (a violation of the right to testify occurs if the "final decision that [defendant] would not testify is made *against his will*") (emphasis added), *aff'd on this point*, 953 F.2d 1525 (11th Cir. 1992).

Instructive is the analogy to the right of self-representation, on which this Court relied heavily in its discussion of the right to testify. *See Rock*, 483 U.S. at 52. The right of self-representation "derives principally from interests beyond insuring that trial outcomes are fair," and instead "reflects values of individual integrity, autonomy and self-expression." *Johnstone v. Kelly*, 808 F.2d 214, 218 (2d Cir. 1986), *cert. denied*, 482 U.S. 928 (1987). As this Court wrote in *Faretta*, "although [the accused] may conduct his defense to his detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.' " 422 U.S. at 834 (citation omitted).

Strickland cannot protect these right-to-testify values because it was developed to protect the very opposite interests. *Strickland*'s "error" prong can all but insulate a violation of the right to testify from redress. The tests for "error" indulge a strong presumption that challenged acts of counsel are "strategy" and declare "strategic" choices to be "virtually unchallengeable," *Strickland*, 486 U.S. at 689-690,[14] and an attorney's "strategic" decision to keep his client off the stand would likely be judged such a "sound strategy."

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14. Even "acts or omissions by counsel that 'might be considered sound trial strategy' do not constitute ineffectiveness.' " *Mason v. Scully*, 16 F.3d 38, 42 (2d Cir. 1994).

Together, this assumes too much of the critical inquiry in a right to testify claim. Squelching the accused's desire to testify will invariably be considered a good strategic decision; with that starting assumption, it becomes difficult to near impossible to prove that the attorney's will overbore the accused's, for it will almost always look like it was the attorney's wise strategic counsel that prevailed. The right to testify, however, is the right to make a decision *regardless of tactical considerations,* to say no to the best strategic advice, and therefore defies protection by the collection of *Strickland* strategy presumptions, which eclipses the res gestae of a right to testify deprivation.

The prejudice prong of *Strickland*, which asks whether the alleged error of counsel affected the verdict or tainted the reliability of the process,[15] denies a remedy for a proven deprivation of the right to testify. This is illustrated with reference to the right of self-representation and harmless error law which is roughly comparable, conceptually, to the prejudice test's concern with outcome-determinativeness. Under this Court's precedents, the right of self-representation is not subject to harmless error analysis but requires reversal.

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15. Under *Strickland,* prejudice requires proof "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable," *Strickland*, 466 U.S. at 687, or that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. Post-*Strickland*, this Court clarified that prejudice "focusing *solely* on mere outcome determination" would be "defective" and should also include "attention to whether the result of the proceeding was fundamentally unfair or unreliable." *Lockhart,* 506 U.S. at 369 (emphasis added). *Lockhart* can be understood as seeking to prevent a windfall reversal on the basis of a change in the law when the defendant suffered no fundamental unfairness.

McKaskle v. Wiggins, 465 U.S. 168, 177 n.8 (1984); *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991). These decisions recognize that denial of the right of self-representation — i.e., the forced assistance of counsel — would almost always be found to be "harmless."

So, too, with the right to testify. Even if a defendant could show that counsel failed to honor his wish to testify, it is unlikely that a defendant can affirmatively prove that his testimony would have done less harm than good. Furthermore, if, as this Court declared in *Rock*, an "accused's right to present his own version of events in his own words" is "[e]ven more fundamental to a personal defense than the right of self-representation," 483 U.S. at 52, and if harmless error does not apply to the right of self-representation, then necessarily harmless error — and its cousin, *Strickland* prejudice — should not apply to the right to testify. *See Underwood v. Clark*, 939 F.2d 473, 475 (7th Cir. 1991) (collecting cases from the Fourth, Fifth, and Seventh Circuits and district courts in Maine and Florida); *Hernandez v. Dugger*, 829 F. Supp. 372, 373 (M.D. Fla. 1992), *vacated without op., Hernandez v. Singletary* (11th Cir. Nov. 15, 1994) (not reported).

Alternatively, assuming the Court should decide that *Strickland* applies to the right to testify, then "prejudice" should be presumed in light of the inherent significance of a defendant's own testimony. As this Court stated, "the most important witness for the defense in many cases is the defendant himself." *Rock*, 483 U.S. at 52. *See Nichols v. Butler*, 953 F.2d 1550, 1553 (11th Cir. 1992) ("[t]he testimony of a criminal defendant at his own trial is unique and inherently significant. The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself.") (citation omitted). *Cf. Passos-Paternina v. United States*,

12 F. Supp. 2d 231, 242 (D.P.R. 1998) ("it is rarely possible to state with absolute certainty that exculpatory testimony provided by a criminal defendant would not have affected the outcome of a trial that ended with a guilty verdict"), *aff'd*, 201 F.3d 428, 1999 WL 668522 (1st Cir. 1999) (per curiam).[16]

For all these reasons, using *Strickland* to measure denials of the right to testify is akin to measuring with a round hole whether the peg is a perfect square, and thus necessarily under-protects the right. Furthermore, the Second Circuit's adoption of the *Strickland* test did not derive from right to testify principles and addressed none of the concerns discussed here but was simply bootstrapped to the earlier determination that the duty to safeguard the right to testify rests, in the first instance, with defense counsel. As illustrated throughout this petition, as applied by the Second Circuit, the rule is devastating to right to testify claims. The Court employs a blinders-on *Strickland* analysis, utterly devoid of any reference to the values of the right to testify or the fundamental concept *Strickland* was supposed to be an alternative means of assessing here, namely, whether a waiver of the right to testify was knowing and intentional. Instead, the framework has fully supplanted the end to which it was only supposed to be a means.

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16. Assuming arguendo that prejudice had to be affirmatively shown, Wilson made such a showing. Wilson's affidavit indicates that he would have sought to address the two dispositive elements of the government's case by offering a different account of the visit with Sloan and by giving a basis for discrediting the hearsay that held up the umbrella theory. The collection of errors committed by his attorney and the absence of any other defense also indicate that Wilson's testimony would have likely made a difference. Further, it has been held that in this context, a "[c]ourt cannot assume that a jury would have rejected [the defendant's] testimony." *Campos v. United States*, 930 F. Supp. 787, 793 (E.D.N.Y. 1996).

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND FILED JUNE 15, 2000

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

* * *

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 15th day of June, two thousand.

Present: HONORABLE RALPH K. WINTER,
Chief Judge,

HONORABLE AMALYA L. KEARSE,
HONORABLE ROSEMARY S. POOLER,
Circuit Judges.

No. 00-1042

UNITED STATES OF AMERICA,

Appellee

– v. –

ROBERT WILSON,

Defendant-Appellant,

Appendix A

PHIL FALCONE, JAMES CONIGLIO, JOSE RODRIGUEZ, also known as Joe, and HEINZ OTTMAR,

Defendants.

* * *

Appeal from the United States District Court for the Southern District of New York (McKenna, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the appeal is hereby AFFIRMED.

Robert Wilson appeals from his conviction following a jury trial before Judge McKenna. Appellant was convicted of violating and conspiring to violate the Racketeer Influenced and Corrupt Organizations Act ("RICO") in violation of 18 U.S.C. § 1962(c) and (d) and of accepting illegal payments in violation of 29 U.S.C. § 186(b)(1) and (d). Appellant argues that the evidence was insufficient to sustain a conviction, that he received ineffective assistance of counsel, and that the court improperly admitted co-conspirators' out-of-court statements and self-incriminating plea allocutions. We affirm.

From the 1970s through the early 1990s, appellant served variously as business manager, vice president, and president of Local 174, a union representing butchers, food handlers, and other food and meat business employees in New York City. Throughout this time period, union officers made concessions to management in exchange for under-the-table cash payoffs.

Appendix A

Oral argument was focused on appellant's claim that the evidence was insufficient to sustain his conviction. On a sufficiency claim, we view the evidence in the light most favorable to the government and affirm if a rational trier of fact could be convinced of appellant's guilt beyond a reasonable doubt. *See United States v. Zichettello*, 208 F.3d 72, 105 (2d Cir. 2000).

At trial, Morton Sloan, an owner of GT Foods, implicated appellant in a shakedown for money effected by union official Robert Felice. Sloan stated that he had met with appellant in the hope of obtaining union concessions and that appellant brought in Felice and remarked, "Morty has a problem. I would like you to help him. Why don't you take a walk with him around the block and see what can be done?" Felice subsequently took a walk with Sloan and worked out a system of cash payments in exchange for union concessions.

Appellant argues that no reasonable jury could have inferred from this testimony Wilson's guilt of the substantive crime alleged. We disagree. Felice was not the union's normal representative for GT Foods, and the plain implications of Wilson's remark in the context they were given was that Felice would work something out with Sloan in their "walk," to ameliorate "Morty ['s] . . . problem." Moreover, there was substantial evidence linking Wilson to twenty years of illegal union payoffs. Though the government was time-barred from prosecuting appellant for this conduct, it was probative of Wilson's criminal intent. Thus, a rational fact-finder could easily have found appellant guilty beyond a reasonable doubt of the substantive RICO offense.

Appendix A

In challenging the sufficiency of the evidence for the RICO conspiracy count, appellant posits the existence of multiple conspiracies rather than a single conspiracy. *Cf. United States v. Nerlinger*, 862 F.2d 967, 972 (2d Cir. 1988) ("Whether the evidence in a case establishes single or multiple conspiracies is a question of fact to be resolved by a properly instructed jury." (quoting *United States v. Friedman*, 854 F.2d 535, 561 (2d Cir. 1988)). However, appellant concedes that the jury was correctly charged on multiple conspiracies. Because the predicate acts alleged each involved similar criminal conduct conducted in a like manner with a common set of characters in the same union, there was sufficient evidence for a reasonable jury to conclude the existence of a single conspiracy.

Appellant also argues that, even if the evidence was sufficient to convict him, it would not have been had his counsel not erroneously moved to strike exculpatory testimony. On cross examination, Sloan stated, "My recollection today is the expression was 'Take a walk around the block,' but it didn't mean anything to me then, and it doesn't now." Appellant's attorney moved to strike the statements of Sloan's personal impressions, noting that "[w]hat it means to him is irrelevant." Appellant contends that moving to strike twelve words of trial testimony constituted constitutionally ineffective assistance of counsel, and that but for this error he would have been entitled to an acquittal as a matter of law.

To succeed on this claim, appellant must show both that counsel's representation was so objectively deficient "that counsel was not functioning as the 'counsel' guaranteed the

defendant by the Sixth Amendment," and "that the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Appellant's claim fails under both prongs of the *Strickland* test. There were strategic reasons why appellant's counsel might have moved to strike the commentary in question, not the least of which was that he hoped to avoid any further line of inquiry about Sloan's subjective impressions of Wilson's intent on redirect. Moreover, as mentioned previously, there was a substantial basis from which the jury could have inferred appellant's criminal intent in the meeting with Sloan and Felice. Sloan's failure to impart subjective meaning to Wilson's comment would not have undercut this basis so significantly to create a reasonable probability that the jury would have changed its verdict and acquitted appellant on the substantive RICO charge. In fact, given the "Morty has a problem" statement, it didn't matter whether Wilson told them to walk in the hall, around the block, or go sit under an apple tree. The pertinent point was that Felice was to take care of "Morty's problem."

Appellant also raises other claims of ineffective assistance of counsel. First, appellant claims that his trial counsel failed fully to investigate various defense leads he suggested, failed adequately to consult with him during his trial, and failed fully to inform him of his right to testify and unilaterally decided not to permit him to testify. *See* Wilson Aff. ¶¶ 3-6, 8-14.

Typically, "ineffective assistance claims requiring the development of facts outside the trial record . . . will not . . . be cognizable" on direct appeal. *Ciak v. United States*, 59 F.3d 296, 303-04 (2d Cir. 1995); *see also Billy-Eko v.*

United States, 8 F.3d 111, 115-16 (2d Cir. 1993), *superseded by statute on different grounds as recognized in Triestman v. United States*, 124 F.3d 361, 369 n.8 (2d Cir. 1997). However, Wilson replaced his trial counsel below after conviction. His new attorney raised these claims to the district court pursuant to Rule 29 and 33 motions, supported by appellant's affidavit. The district court resolved the claims on the merits. Thus, appellant has had a full and fair opportunity to develop a record in support of his claims, and in the interests of justice and judicial economy we consider his arguments on direct appeal. *Cf. United States v. Stantini*, 85 F.3d 9, 20 (2d Cir. 1996).

Appellant offers nothing beyond his own self-serving affidavit in support of his claims, having presented neither an affirmation from his trial counsel nor any affidavits from his list of allegedly uncontacted witnesses. As the district court noted, it is far from clear that Wilson's affidavit, read in its totality, even alleges that his trial counsel failed adequately to consult and inform him about his right to testify and the progress of his case. Even assuming *arguendo* that appellant was not so advised, he has made no showing that his failure to testify somehow prejudiced his defense. *See Brown v. Artuz*, 124 F.3d 73, 79-81 (2d Cir. 1997) (defendant alleging ineffective assistance in counsel's failure to advise about right to testify must establish prejudice under second prong of *Strickland* analysis).

As to the failure-to-investigate claim, the testimony that appellant suggests his trial counsel could have elicited from his list of allegedly uninterviewed witnesses would be of minimal relevance at best. Thus, appellant has not shown

that his trial counsel's alleged failure to interview and call these witnesses either fell below an objectively reasonable standard of representation or prejudiced his defense. *Cf. Strickland*, 466 U.S. at 687.

Appellant also argues that he received ineffective assistance of counsel because his counsel's opening statement gave a "calamitous, theory-less first impression." However, even waiving an opening statement does not constitute ineffective assistance of counsel. *See United States v. Nersesian*, 824 F.2d 1294, 1321 (2d Cir. 1987). Indeed, we have specifically noted that it may often be preferable for a defense counsel to avoid committing prematurely to a theory. *See id.* Thus, the strategic decision by appellant's trial counsel not to offer an "affirmative competing defense theory" was not ineffective assistance of counsel. *See Strickland*, 466 U.S. at 690 ("[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable . . . .").

We are also unpersuaded by appellant's arguments that he was "inculpated" by his trial counsel's opening statement. Rather, appellant's attorney was clearly trying to suggest that the "betrayal" of union members of which the government was accusing appellant was actually committed by other union officials, and that those officials implicated appellant to save their own skins. Nor did the attorney's opening statements, as appellant claims, "elevate[ ] Wilson's perceived status in the hierarchy of the charged conspiracy." Although the attorney did suggest that appellant was the "ultimate target" of the government's investigation, the implication was that he had been unfairly targeted merely

because he had headed the union from 1983-93, and that other union officials who were in fact corrupt had opposed Wilson and in fact defeated his reelection. Thus, these opening remarks were not objectively deficient, nor could they have prejudiced the defense. *Cf. id.* at 687.

Finally, appellant challenges his attorney's failure to object to certain co-conspirator out-of-court statements and plea allocutions. As we discuss *infra*, these statements and allocutions were not erroneously admitted. Therefore, appellant was not prejudiced by his counsel's failure to keep them out. *Cf. id.* at 693, 697 ("[T]he defendant must show that [alleged errors of counsel] actually had an adverse effect on the defense," and "there is no reason . . . to address both components of the inquiry if the defendant makes an insufficient showing on one.").

Wilson challenges the admission of co-conspirator statements under Fed. R. Evid. 801(d)(2)(E) and the Confrontation Clause of the Sixth Amendment. We consider these challenges in tandem; because admission of co-conspirator statements under Rule 801(d)(2)(E) is a firmly rooted exception to the Confrontation Clause, there is no constitutional error if the statements were properly admitted under the evidentiary rule. *See, e.g.*, *United States v. Diaz*, 176 F.3d 52, 86 (2d Cir.), *cert. denied*, 120 S. Ct. 181, 314, 315, 386 (1999).

Appellant challenges the admission of testimony by Jose Rodriguez as to statements by William Kissel that Wilson was receiving a portion of Republic Veal's payoffs, as well as statements of Kissel alluding to "mob" ties. An out-

of-court statement is nonhearsay under Rule 801(d)(2)(E) if the district court determines by a preponderance of the evidence that a conspiracy including the defendant existed and that the hearsay statement was made in furtherance of the conspiracy. *See, e.g., United States v. Gigante*, 166 F.3d 75, 82 (2d Cir. 1999), *cert. denied*, 120 S. Ct. 931 (2000). Here, the preponderance of the evidence easily suggested the existence of a conspiracy including the appellant, and both of the challenged statements were made during and in furtherance of the conspiracy. Thus, the statements were not excludable as hearsay.

Moreover, admission of the co-conspirator statements was harmless. The Republic Veal statements could not have affected the jury's verdict because the jury found appellant not guilty of the Republic Veal predicate acts. The few allusions to the "mob" were not so inflammatory as to taint the verdict or cause us to question the jury's decision.

Appellant also challenges the admission of the self-inculpatory plea allocutions of two co-conspirators as an abuse of discretion under Fed. R. Evid. 804(b)(3) and a violation of the Confrontation Clause. We have yet to decide whether declarations against interest under Rule 804(b)(3) are "firmly rooted" exceptions to the hearsay rule. *See United States v. Moskowitz*, __ F.3d __, Nos. 99-1745, -1769, 2000 U.S. App. LEXIS 11733, at *7 (2d Cir. May 25, 2000) (per curiam); *United States v. Gallego*, 191 F.3d 156, 167 (2d Cir. 1999), *cert. denied*, 120 S. Ct. 961 (2000). However, we have determined allocutions admitted under Rule 804(b)(3) to have "particularized guarantees of trustworthiness" sufficient to withstand a Confrontation Clause challenge, where, *inter alia*,

> (1) the plea allocution "undeniably subjected [the defendant] to the risk of a lengthy term of imprisonment, even if it was also made in the hope of obtaining a more lenient sentence"; (2) "the allocution was given under oath"; and (3) "the district court instructed the jurors that they could consider [the defendant's] allocution only as evidence that a conspiracy existed and not as direct evidence that defendants were members of that alleged conspiracy or that they were otherwise guilty of the crimes charged against them."

Moskowitz, 2000 U.S. LEXIS App. 11733, at *7-*8 (quoting *Gallego*, 191 F.3d at 167). Those "particularized guarantees of trustworthiness" being present in the instant case, the plea allocutions were not erroneously admitted.

We therefore affirm.

FOR THE COURT:
ROSEANN B. MacKECHNIE,
Clerk

s/ Lucille Carr 6/15/00
By: Date

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED MARCH 5, 1999

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

95 Cr. 668 (LMM)

UNITED STATES OF AMERICA,

– against –

ROBERT WILSON,

Defendant.

MEMORANDUM AND ORDER

McKENNA, D.J.

Defendant moves for (i) judgment of acquittal pursuant to Fed. R. Crim. P. 29(c) or, in the alternative, a new trial, pursuant to *id.* 33. The motions are denied.

1.

As to the motion for judgment of acquittal, the Court does not find that, viewing the evidence in the light most favorable to the government and drawing all permissible inferences in the government's favor, no rational juror could be convinced, beyond a reasonable doubt, of defendant's

guilt. *See United States v. Martinez*, 54 F.3d 1040, 1042-43 (2d Cir.), *cert. denied*, 116 S. Ct. 545 (1995).

2.

The motion for a new trial is "principally based upon the claim that [defendant's] trial counsel did not provide him with the standard of representation required by the Constitution." (Bergman Aff. ¶ 1 (footnote omitted).) Under that standard — enunciated by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984) — defendant "must show that [trial] counsel's conduct did not meet 'an objective standard of reasonableness,' and that there is a reasonable probability that the outcome would have been different 'but for counsel's unprofessional errors.' " *United States v. Romero*, 54 F.3d 56, 59-60 (2d Cir. 1995) (quoting *Strickland*, 466 U.S. at 688, 694). After review of the alleged errors of trial counsel for defendant detailed in the moving affidavit of present counsel for defendant, the Court concludes that neither prong of the test has been met.[1] Several of defendant's contentions merit further discussion.

Trial counsel's determination not to call defendant as a witness does not change the Court's conclusion. It is plain from defendant's moving affidavit that the question was discussed with him. (*See* Wilson Aff. ¶¶ 10-12.) Indeed, defendant acknowledges awareness of trial counsel's "personally held belief that it would be a mistake for [him]

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1. In reaching its conclusion, the Court has considered the list of potential witnesses submitted *ex parte* by defendant (*see* Bergman Aff. at 10 n.6), without passing upon the propriety of its submission *ex parte*.

to expose [him]self to cross-examination." (*Id.* ¶ 11.) Defendant does not say that trial counsel did not inform him that the "ultimate decision whether to take the stand" belonged to defendant, *see Brown v. Artuz*, 124 F.3d 73, 79 (2d Cir. 1997), or that he had told trial counsel that he had chosen to testify notwithstanding trial counsel's view that it would be a mistake. Defendant's affidavit is, in fact, most consistent with a determination by defendant and trial counsel, after discussion, that it would be up to trial counsel to call defendant or not as he thought it advisable. (*See* Wilson Aff. ¶ 14 ("possibly calling me to the witness stand").)[2] The decision not to call defendant, further, was not unreasonable in the circumstances, in view of possible cross-examination. (*See* Gov't Letter Brief at 4-5.)

Defendant cites trial counsel's failure to object to certain co-conspirator statements as evidence of ineffective assistance of counsel. Co-conspirator statements are admissible Fed. R. Evid. 801(d)(2)(E) where there is "evidence that there was a conspiracy involving the declarant and nonoffering party, and that the statement was made 'during the course and in furtherance of the conspiracy.' " *Bourjaily v. United States*, 483 U.S. 171, 175 (1987). For purposes of determining the admissibility of the statement, such facts need only be proved by a preponderance of the evidence. *Id.* at 176. The statements in question may themselves be considered in determining their admissibility. *Id.* at 181. There must, however, be "some independent corroborating evidence of the defendant's participation in

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2. The Court is aware of no "resulting look" on defendant's face when trial counsel rested. (*Cf. id.* ¶ 14.)

the conspiracy." *United States v. Tellier*, 83 F.3d 578, 580 (2d Cir. 1996).

The appropriate procedure in a conspiracy case is to admit co-conspirator statements subject to connection and to determine, "when all the evidence is in," whether the preliminary factual predicates for admission have been supplied. *United States v. Stanchich*, 550 F.2d 1294, 1297-98 (2d Cir. 1977) (Friendly, J.) (quoting *United States v. Geaney*, 417 F.2d 1116, 1120 (2d Cir. 1969), *cert. denied*, 397 U.S. 1028 (1970)). Thus, when the Court denied defendant's motion to dismiss the indictment (including the conspiracy count) (Tr. 536), trial counsel would have been correct in thinking that the prerequisites to admission of co-conspirator statements had been satisfied. At that time, the record included evidence independent of co-conspirator statements that corroborated defendant's participation in the conspiracy. (*See* Tr. 250-253 [Tichauer] & 467-468 [Schatten].)

Defendant also assigns as an example of ineffective assistance of trial counsel the failure to call *Williamson v. United States*, 512 U.S. 594 (1994), to the Court's attention in connection with the admission into evidence of the redacted plea allocutions of former defendants Coniglio and Falcone. *Williamson* was, however, called to the Court's attention by the government. (*See* Bergman Aff. ¶ 47 & Ex. D at 4.)

Williamson did not bar the admission of those redacted plea allocutions. In *Williamson*, the Supreme Court considered the admissibility under Fed. R. Evid. 804(b)(3) of a confession made to a Drug Enforcement Agency agent

as being against penal interest. The Supreme Court found that "[s]ome of [the] confession would clearly have been admissible under Rule 804(b)(3)" but that "other parts of [the] confession, especially the parts that implicated [the defendant], did little to subject [the declarant] himself to criminal liability," and faulted the District Court and the Court of Appeals for not inquiring whether "each of the statements in [the declarant's] confession was truly self-inculpatory." 512 U.S. at 604. Here, the statements read to the jury (Tr. 514-517) were redactions of plea allocutions under oath and were, in the Court's view, both inculpatory of Falcone and Coniglio and did not implicate defendant in criminal conduct. Further, the Court instructed the jury immediately after the statements were read to the jury that they might be considered as "evidence of the activities of [Falcone and Coniglio]" and "on the issue of whether there was or was not a conspiracy to accept payments from employers," but not on "[t]he question whether Mr. Wilson was a member of a conspiracy." (Tr. 517-518.) The Court further instructed the jury that "[t]here is no evidence in either of [the plea allocutions] naming Mr. Wilson" and that:

> If you find that there was a conspiracy, then the question of whether Mr. Wilson was engaged in that conspiracy would have to be proved entirely by other evidence, and as I said, there is nothing in either of those plea allocutions that proves that Mr. Wilson was a member of any conspiracy, if you find that there was a conspiracy.

(*Id.* 518.) *See Williams v. United States*, 927 F.2d 95, 98 (2d Cir.), *cert. denied*, 502 U.S. 911 (1991).

For the foregoing reasons, the redacted plea allocutions were admissible under *Williamson* and, even if trial counsel could be faulted for not calling the Court's attention to a case of which the Court had already been made aware by the government, his additional reference to the case would not have resulted in exclusion of the redacted Falcone and Coniglio plea allocutions.

3.

Defendant's motion is denied. Sentencing is scheduled for June 22, 1999 at 4:30 P.M.

SO ORDERED.

s/ Lawrence M. McKenna
LAWRENCE M. McKENNA
U.S.D.J.

Dated: New York, New York
March 5, 1999